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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

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JOHN A. BURNS, Governor of the State of Hawaii, *Appellant,*

—v.—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

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ELMER F. CRAVALHO, *et al.,* *Appellants,*

—v.—

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KAZUHISA ABE, *et al.,* *Appellants,*

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---

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

---

## BRIEF FOR ELMER F. CRAVALHO, *ET AL.*

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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## BRIEF FOR ELMER F. CRAVALHO, *ET AL.*

## OPINIONS BELOW

The opinion of the District Court dated February 17, 1965 (R. 62-81) is reported at 238 F. Supp 468. Its opinion dated April 28, 1965 (R. 151-65) is reported at 240 F. Supp. 724.

## JURISDICTION

This action was brought under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201, 2202 for a declaration of the invalidity and for preliminary and permanent injunction to enjoin the enforcement of the provisions of the Constitution of the State of Hawaii relating to the apportionment of the Senate and House of Representatives of the Hawaii Legislature on the ground of their repugnancy to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (R. 1-29)

The District Court's first order dated February 17, 1965, was entered April 9, 1965. The second order was dated and entered April 28, 1965. The second order reinstated certain provisions of the first order, which in the interim had been temporarily suspended.

Elmer F. Cravalho, *et al.*, filed their Notice of Appeal on May 7, 1965. (R. 184-87)

The Supreme Court of the United States has jurisdiction to review the orders on direct appeal under 28 U.S.C. §§ 1253 and 2101 (b).

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Amendment XIV, Section 1, Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4, 5, and 11, of the Consti-

tution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 10 *et seq.*, relating to the apportionment of the Hawaii Senate and House of Representatives and the sessions of the Hawaii Legislature.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 22 *et seq.*, which sets forth a schedule of the representative districts and the number of representatives to be elected from each district.

4. Article XV of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 21 *et seq.*, relating to the methods of revision and amendment of the Hawaii Constitution.

5. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii, which is the Hawaii Senate Reapportionment Plan. (R. 113-18)

The above are set forth in Appendix A, pp. 1a-20a.

## QUESTIONS PRESENTED

1. Does the Equal Protection Clause necessarily require that the Hawaii Senate be apportioned in accord with a rule of single-member districts, where the House of Representatives, with single-member and multi-member districts, has been found to be constitutionally apportioned, so that the Legislature would have the burden of justifying that a total apportionment scheme with multi-member districts in both houses does not operate to minimize or to cancel out the voting strength of political, social, economic, or racial elements of the voting population and the burden of justifying that the two houses complement each other in accord with the United States Constitution?

2. Does the fact that the geographical boundaries of certain districts of one house of a bicameral legislature of the State of Hawaii are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house violate the Equal Protection Clause?

3. Should this Court vacate the District Court's injunction against the legislators from enacting any legislation until legislation looking toward the convening of a constitutional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed?

4. Where certain provisions of the Hawaii Constitution relating to the apportionment of the Hawaii Senate are invalid, does the Legislature of the State of Hawaii have the authority to enact at least temporary reapportionment legislation relating to the Hawaii Senate, pending the adoption of valid amendments to the Hawaii Constitution providing for the reapportionment of the Hawaii Senate in accord with the United States Constitution?[1]

5. Does the reapportionment plan for the Hawaii Senate which the Legislature of the State of Hawaii submitted to the District Court on April 14, 1965, pursuant to the order of the District Court, violate the Equal Protection Clause?

## STATEMENT OF THE CASE

The case was instituted in the United States District Court for the District of Hawaii under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201, 2202 by Complaint filed on August 13, 1964, by the original plaintiffs

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[1] With respect to this question Elmer F. Cravalho, *et al.*, agree with the argument of Governor John A. Burns, in his Brief, pp. 86-90. (References to the Governor's Brief are hereafter "Gov. ")

Henrietta Davidson Holt, *et al.*, as citizens, taxpayers and electors of the State of Hawaii, on their behalf and on behalf of others. (R. 1-29) The Complaint sought a declaratory order that Sections 2, 3 and 4 of Article III, Section 1 of Article XVI, and the proviso at the end of the sixth paragraph in Section 2 of Article XV of the Hawaii Constitution which dealt with the apportionment of the Hawaii Legislature had deprived and continued to deprive the complaining citizens of liberty and property without due process of law and of the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution. (R. 11)

The Complaint also sought an injunction against the Lieutenant Governor of the State of Hawaii, the officer charged with the responsibility for supervision of State elections, prohibiting him from proceeding with the 1964 general election until such time as the Hawaii Legislature had been reapportioned to the satisfaction of the District Court. (R. 11-12) Failing satisfactory reapportionment through the efforts of the Legislature itself, the Complaint requested that the District Court undertake to reapportion the Legislature. (R. 13)

On August 24, 1964, John A. Burns, Governor of the State of Hawaii, (appellant in No. 318) intervened as intervenor-plaintiff, (R. 37-41) and Nelson K. Doi, *et al.*, (now Kazuhisa Abe, *et al.*, appellants in No. 409) being certain State senators, intervened as party defendants. (R. 42-48)

On that same day Elmer F. Cravalho, *et al.*, (appellants in No. 323) being certain members of the Hawaii House of Representatives, intervened in the case below as party defendants, with a view to making the position of the House known to the District Court and facilitating the reapportionment. (R. 49-53)

On August 26, 1964, a three-judge court, convened pur-

suant to 28 U.S.C. § 2281 *et seq.*, denied the prayer of the plaintiffs Henrietta Davidson Holt, *et al.*, to enjoin the conduct of the 1964 election for State legislative offices, and the District Court thereafter held a full hearing on the Complaint in January, 1965.

On February 17, 1965, the District Court filed its Order, entered April 9, 1965, adjudging those certain provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of senators per senatorial district and the said proviso of Article XV, Section 2 relating to the amendments affecting representation in the Senate were unconstitutional and invalid (R. 79; 238 F. Supp., at 478) and also holding that any change in the representation from any Hawaii senatorial district must be by constitutional amendment and not by statute. (R. 78; 238 F. Supp., at 478) The Order also denied the prayer of the Governor to enjoin the 1966 election but provided, in lieu thereof, relief prompting reapportionment by enjoining the legislators, including Elmer F. Cravalho, *et al.*, from enacting any legislation until legislation pursuant to the provisions of Article XV of the Hawaii Constitution providing for the submission to the people of Hawaii by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law. (R. 80; 238 F. Supp., at 479)

On March 1, 1965 Elmer F. Cravalho, *et al.*, and Nelson K. Doi, *et al.*, (now Kazuhisa Abe, *et al.*) through counsel jointly filed a motion to alter or amend judgment to allow the Hawaii Legislature to propose and submit to the District Court for its approval a reapportionment plan of the Hawaii Senate providing thereby an opportunity to avoid the costly and circuitous route of accomplishing reapportionment at a

constitutional convention. (R. 82-88) The court below granted the said motion and by Order of March 9, 1965, entered March 19, 1965, provisionally amended Paragraph 4 of its Order of February 17, 1965 (which had not at that time been entered) to permit the Legislature (a) to enact a provisional reapportionment and redistricting plan for the Senate; (b) to adopt a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan for submission to the electorate at the 1966 general election; and (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This Order, like the one of February 17th, demanded that the plan be approved by the District Court; failing approval, the Order of February 17th demanding legislation for implementing a constitutional convention would again become effective. (R. 88-91)

On March 18, 1965, the Legislature advised the District Court that a provisional reapportionment and redistricting plan for the Senate, in substance approved by both Houses, was then in conference committee and about ready to be presented to the District Court, whereby the Senate was reapportioned by dividing the State into the same original and existing six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportions. (R. 153-54; 240 F. Supp., at 726) By that March 18th plan, the senators were apportioned as follows: (R. 154; 240 F. Supp., at 726)

| County | Senatorial District | No. of Senators |
|---|---|---|
| Hawaii | First | 2 |
| " | Second | 1 |
| Maui | Third | 2 |
| Oahu | Fourth | 9 |
| " | Fifth | 10 |
| Kauai | Sixth | 1 |

The Legislature quickly thereafter was informally made to understand by the District Court that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire Senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the House. (R. 154; 240 F. Supp., at 726) Shortly thereafter, the District Court informally indicated that because Hawaii had a multi-member district House, the District Court would require a rule of single-member districts for the Senate so that any other than single-member senatorial districting would have to be justified to the District Court. (R. 154; 240 F. Supp., at 726) And in its Decision and Order of April 28, 1965, the District Court below ultimately decided that this rule of single-member districts was the "means by which the Senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162; 240 F. Supp., at 731)

## 1. The Proposed Provisional Plan

Pursuant to the Order of March 9, 1965, entered March 19, 1965, and after the informal advice of the District Court with respect to the March 18th plan and the rule of single-member districts for the Senate, the Legislature, on April 14, 1965, passed and sent to the District Court the following bills: (a) H. B. 987,[2] the proposed provisional senatorial

[2] The provisional senatorial reapportionment plan (H. B. 987) was passed by both houses of the Hawaii Legislature and submitted to the Governor of Hawaii for approval. The Governor neither approved nor vetoed the bill within the period provided in the Hawaii Constitution. Therefore, on July 26, 1965, the bill became law without the Governor's signature. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii. (Appendix A, pp. 15a-20a)

reapportionment plan; (b) H. B. 773, the proposed constitutional amendment embodying that same plan; and (c) H. B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. (R. 103-04) By H. B. 987, the State was divided into eight senatorial districts, *viz.:* (R. 120-21, 154; 240 F. Supp., at 727)

| County | Senatorial District | No. of Senators | 1964 Registered Voters per District |
|---|---|---|---|
| Hawaii | First | 3 | 28,130 |
| Maui | Second | 2 | 18,786 |
| Honolulu | Third | 3 | 27,073 |
| " | Fourth | 4 | 35,780 |
| " | Fifth | 4 | 39,361 |
| " | Sixth | 4 | 40,629 |
| " | Seventh | 4 | 37,336 |
| Kauai | Eighth | 1 | 12,266 |

The reports of the conference committee on the proposed provisional plan (H. B. 987), as well as the proposed plan for the constitutional amendment (H. B. 773) embodying the same setting forth the conference committee's reasons for redistricting the Senate on a multi-member district basis were also presented. (R. 105-11, 119-29)

Substantially all the evidence concerning the proposed provisional plan (H. B. 987) were covered by the report of the conference committee which considered and reported the bill out, the testimony of Sakae Takahashi and the testimony of Robert Schmitt.

### a. The Conference Committee Report

The conference committee report on H. B. 987[3] covering the proposed provisional senatorial reapportionment plan

[3] The conference committee report on H. B. 987 incorporates the conference committee report on H. B. 773. (R. 111)

(hereinafter called the "Senate plan") set forth the bases and considerations on which the Senate plan was founded. (R. 123-28) According to the conference committee report, the committee first determined against a single-member districts rule in favor of multi-member districts because of its deep concern that single-member districts have a tendency to foster primary concern with local issues and to "fragment the approach to statewide problems and programs... to the detriment of the State as a whole." (R. 123) The committee believed that multi-member districts would provide a means toward "increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns." (R. 124) The committee's preference for multi-member districts was in part also prompted by history and tradition of a member of the House having a shorter term, representing a smaller constituency and being of a numerically larger body than a member of the Senate, and this experience had proved a desirable balance and "meaningful in achieving the concept of bicameralism initially sought by the constitutional convention." (R. 123) It recognized the probability of significant population shifts suggested by the rapid development of residential subdivisions on the island of Oahu which shifts in turn would necessitate more frequent reapportionment and readjustments of district lines in the case of single-member districts. (R. 125) It felt that too large a number of senators from one district or too large a number of vacancies to be filled in the same election from one district might confuse and make difficult intelligent voter selection (R. 124), but also felt that two-member districts for Oahu would not alleviate the worries of single-member districts and that three-member districts ought to be avoided because the districts would then approach the population and geographical

sizes of the House representative districts, a similarity which may have a negative effect on the complexion of bicameralism. (R. 127-28)

In the formulation of the Senate plan the committee attempted to "apportion one senator to every 9,500 registered voters." (R. 126) Aside from numerical parity, the district lines of the first, second and eighth senatorial districts corresponded to and maintained the boundaries of the existing counties of Hawaii, Maui and Kauai.[4] (R. 125) The recognition of the counties was intended to "assure some voice to the counties as political subdivisions" inasmuch as they had been historically administered separately and were physically insulated from each other. (R. 125) The county and island of Hawaii which heretofore was composed of two senatorial districts was made into one senatorial district "prompted in large part to equalize the registered voter population of that island with the districts on Oahu to the extent possible." (R. 127)

With respect to the City and County of Honolulu (island of Oahu), numerical parity of one senator to every 9,500 registered voters was again the equal population standard. (R. 126) In drawing the district lines, the committee "relied very heavily on the standards of compactness and contiguity." (R. 126) The Koolau Mountain Range determined the boundaries of the third senatorial district, being all of the "windward side" of Oahu. (R. 126) Although the boundaries of the third senatorial district coincided with the eighth representative district, the committee believed that

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[4] Hawaii county is made up of the island of Hawaii; Maui county is made up of four islands in close proximity being the islands of Maui, Molokai, Lanai and Kahoolawe; Kauai county is made up of two islands in close proximity being the islands of Kauai and Niihau; and the City and County of Honolulu is made up of the island of Oahu.

the well-defined geographical separation by the Koolau Mountain Range was controlling in this instance. (R. 126) The fourth senatorial district was generally made up of the "leeward side." (R. 126) The fifth, sixth and seventh senatorial districts were bounded by "lines running from the Koolau Range to the ocean along well-defined and long established representative district and precinct lines." (R. 126) Although cognizant of the widest disparity between the fourth senatorial district, entitled to four senators, with 35,780 registered voters (8,945 per senator) and the sixth senatorial district, entitled to four senators, with 40,629 registered voters (10,157 per senator), the committee elected not to favor the cause of arithmetical consistency over compactness, contiguity and community of interest as it would have "meant the splitting of the heart of the Kalihi community and adding a portion thereof to the leeward Oahu communities which are geographically removed from and foreign to Kalihi." (R. 126-27)

The committee believed that the bases applied in the reapportionment and redistricting scheme under the Senate plan achieved districts "as nearly of equal population as is practicable" and provided "fair and effective representation to all citizens." (R. 128)

### b. Testimony of Sakae Takahashi

Sakae Takahashi, a Hawaii State senator and vice-president of the Hawaii Senate and chairman of the senate judiciary committee, served as chairman of the conference committee which considered the Senate plan. (R. 293-94) He testified as a member of the conference committee to explain and amplify the reasons for the actions of the committee. (R. 294)

Senator Takahashi testified in favor of the Senate plan.

(R. 306) In addition to the clarification of the matters set forth in the committee report, he stated that the committee did not discuss the complete redistricting of the House to make the House single-member districts (R. 297), nor discuss the fact that there were multi-member districts in the House. (R. 298) Discussion, if any, in this respect was that the "House districting plan would be left alone." (R. 311) The position taken by the committee was that there was "nothing wrong with having multi-member districts in the Senate and multi-member districts in the House." (R. 298)

Senator Takahashi also identified the residences of Senators Esposito, Porteus and Fukushima within the fifteenth representative district (R. 302-03) and delineated also the residences of Senators Ariyoshi, Kido and Takahashi within the twelfth representative district (R. 308) and the residences of Senators Hulten and Pryor within the eighth representative district. (R. 308-09)

**c. Testimony of Robert Schmitt**

Robert Schmitt, statistician, (R. 201) testified that the number of senators apportioned to the several senatorial districts on the basis of the 1964 registered voters under the Senate plan was correctly computed under the method of equal proportions. (R. 317) His opinion was that "on the basis of substantial equality of the number of registered voters, on the use of long standing statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out." (R. 317) More specifically as to certain district lines he commented as follows:

*Third senatorial district*—"the windward side consisting of Koolauloa and Koolaupoko judicial districts has

formed a unit since earliest antiquity;" (R. 321) "has long been used for statistical analysis . . . [and] happens to be consistent to the 9th Tax Zone on this island" [Oahu]. (R. 321)

*Fourth senatorial district*—"the breakdown between the 4th and 5th Senatorial Districts, which runs between Fort Shafter and Kalihi, is also a long-standing boundary." (R. 321) "[We] have defined here in the 4th District an area of community of interest, of similar occupational background, that is, largely Armed Forces and their dependents, plus many civilian employees of Pearl Harbor, Barber's Point and Schofield Barracks. And it does provide a very meaningful boundary." (R. 322)

*Fifth senatorial district*—"breakdown of the 5th and 6th Districts deviates from an existing political boundary. However, it is quite close to the boundaries used in census tract statistics by the United States Bureau of the Census. It also very neatly separates Kakaako from the central business district and it does seem to provide for a clear distinction between areas of different social and housing, economic characteristics." (R. 323)

*Sixth and seventh senatorial districts* — "division between the 6th and 7th Districts, with the exception of a small jog in the St. Louis Heights area, is identical to that between the 2nd and 3rd Taxation Zones. It corresponds to an old ahupua[a] line and has been used for statistical purposes. . . . [T]here is a considerable difference between the typical residences on the Koko head side [east] of Diamond Head as distinguished from the residences Ewa [west] of it. For example, the 6th District has most of the apartments, residential structures in Hawaii. The area on the Koko head side [east] of

the 7th District is primarily a single family housing district." (R. 323)

*First senatorial district*—The trend is a growing population for West Hawaii and a declining population for East Hawaii at such a rate that would tend to affect representation that would require more frequent districting than every ten years. Election at large as one district would effectively compensate population shifts within the county. (R. 324)

Mr. Schmitt also testified that the statistical "law of large numbers" might be a consideration in the use of multi-member districts rather than single-member districts. (R.318) He explained that a large number of small districts would be subject to considerable fluctuation in a short period of time in the number of registered voters whereas a small number of large districts would proportionately be subject to much less fluctuation in the number of registered voters so that areas of growth or declining population would tend to balance each other out over a period of a decade. (R. 318)

With respect to the character of the populace within the districts, Mr. Schmitt testified on cross-examination that the fifteenth representative district (portion of the sixth senatorial district) was heterogeneous from the standpoint of race, income and occupation. (R. 329) The fifth senatorial district was substantially composed of the twelfth, thirteenth and fourteenth representative districts. (R. 133) Mr. Schmitt described the upper part of Nuuanu in the fourteenth representative district as "a very distinct socio-economic area" with the highest proportion of wealthy widows. (R. 330) The people in the fourteenth were ethnically quite different with divergence in income and occupational status as well. (R. 330) The thirteenth had very little of the upper socio-economic status with a high percentage of persons of

Asiatic ancestry constituting more in the laboring class than those in the twelfth. (R. 330) The sixteenth and seventeenth representative districts which made up the seventh senatorial district contained heterogeneous classes of people with low-income Palolo Valley laborers and clerical workers to high income Waialae-Kahala professionals and managerial group. (R. 331)

## 2. Decision and Order on the Senate Plan

The court below, by its Decision and Order of April 28, 1965, held that the Senate plan failed to give each voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment. (R. 162-63, 164; 240 F. Supp., at 731-32) The court below described the creation of boundaries of the third senatorial district which were identical to the boundaries of the eighth representative district and the creation of the boundaries of the sixth senatorial district which coincided to a great degree with those of the fifteenth representative district as "monolithic political units" or "monoliths". (R. 160; 240 F. Supp., at 730) A monolith, the court below stated, provides for the election of representatives and senators from one political and geographical unit all responsible to and representing exactly the same constituency (R. 160; 240 F. Supp., at 730) so as to "concentrate and intensify the voting power of a single senatorial-representative district to the point that voters therein have a built-in disproportionate representational advantage over any other voters of the State." (R. 159; 240 F. Supp., at 729) And the court emphasized that "[s]uch artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such monolithic political unit."

(R. 160; 240 F. Supp., at 730) The court below concluded that "there should not be any monolithic political units of representation in that all inclusive system of apportionment" (R. 160; 240 F. Supp., at 729) lest the "demanded differing complexions and collective attitudes [in the house and senate] are lost." (R. 160; 240 F. Supp., at 729-30)

Additionally, the court below stated that "[t]here can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic" (R. 158; 240 F. Supp., at 729) and that the Legislature failed or ignored to consider certain factors in setting up the senatorial districts. The court below stated: (R. 161; F. Supp., at 730)

> "While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. 'All who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and whatever their home may be in that geographical unit. *Gray* v. *Sanders,* 372 U. S. 368, 378.'"

and further stated: (R. 156; F. Supp., at 728)

"Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems were given little if any consideration by the Legislature."

The court below did not dispute the fact that the Legislature used, at least, the bases of registered voters, geographical boundaries, historical representative district lines, compactness and contiguity. (R. 156; 240 F. Supp., at 727-28) It was never contended that there was not substantial equality of registered voter population among the eight senatorial districts under the Senate plan and the District Court agreed that the number of registered voters per senatorial district conformed to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii. (R. 155; 240 F. Supp., at 727)

Finally, the court below found "that the present multi-member district scheme of senatorial reapportionment resulted in a material part at least, from gerrymandering." (R. 163; 240 F. Supp., at 732) This finding was based on the "probability" that "[t]o have crosscut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat." (R. 163; 240 F. Supp., at 731) The court below also found that the "same factor of political self-preservation" motivated the districting of Hawaii county as an entirety. (R. 163; 240 F. Supp., at 731)

The court below also reviewed the testimony of Robert Schmitt but stated that "[h]e, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines." (R. 156; 240 F. Supp., at 728)

The court below found that the Senate plan failed to meet the test of equality of representation set down by this Court and disapproved the plan. (R. 164; 240 F. Supp., at 732) Thereupon the lower court reinstated item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of that court dated February 17, 1965, which enjoined the legislators from enacting any legislation until legislation for the calling of a constitutional convention shall have been enacted. (R. 164; 240 F. Supp., at 732) On application of May 13, 1965 by the Governor, Mr. Justice Douglas, on May 21, 1965, granted a stay of the District Court's injunction pending the issuance of the judgment of this Court.

## SUMMARY OF ARGUMENT

### I

In its proposed Senate plan, the Hawaii Legislature constructed multi-member senatorial districts with the apportionment of senate seats and the drawing of district lines based primarily on substantial equality of population,[5] boundaries of existing political subdivisions, compactness and contiguity, and historical and natural boundaries. The court below concluded as much. In passing upon the constitutionality of the Senate plan, however, the court below, noting that the Hawaii House of Representatives was composed of single-member and multi-member districts, imposed a rule of single-member districts, the deviation from which, the court insisted, must be justified with consideration of the totality of racial, socio-economic, occupational, political and community of interest factors in addition to the bases of population, compactness and contiguity, and historical

[5] The Hawaii Legislature utilized the registered voter population basis in the Senate plan pursuant to Final Order on Motion to Alter or Amend Judgment dated March 9, 1965. (R. 89)

and natural boundaries which were considered by the Hawaii Legislature. The court below also condemned the "monolithic political unit", where the boundaries of the district of one house are identical to or coincide to a great degree with the boundaries of a district of the other house, as giving the majorities within such districts a disproportional monolithic command over entrapped minorities and over voters in non-monolithic districts.

The court below did not apply the proper constitutional standard in (1) imposing a rule of single-member districts thereby requiring the Hawaii Legislature to justify the multi-member districts with racial, socio-economic, political, occupational and community of interest factors and (2) holding that the monolithic political unit is unconstitutional.

A. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. There is no rule of constitutional preference for single-member districts. The Hawaii Legislature desired and pursued the creation of multi-member districts. The Governor who opposed the Senate plan has the burden of demonstrating that the multi-member districting scheme operates to minimize or cancel out the voting strength of racial or political elements. The record is barren of any such demonstration that the Senate plan operates to minimize or cancel out anyone's voting strength in the overall representation accorded to the State's voters in both houses of the Hawaii Legislature.

The showing by the Hawaii Legislature that it utilized the basis of population as the controlling factor together with the usual and permissible bases of political subdivisions, compactness and contiguity, and natural and historical boundaries for the Senate plan was sufficient. In the absence of evidence showing that such bases were not em-

ployed, the Legislature was not obliged to further justify the multi-member districts with racial, socio-economic, political, occupational and community of interest factors. All principles and circumstances concerning such factors which reasonably may be conceived to justify and uphold the Senate plan are presumed to exist in favor of the validity of the legislative act. Moreover, the Hawaii Legislature was under no duty to consider race which is a constitutionally impermissible basis. The opponents of the Senate plan must demonstrate that the Senate plan operates to minimize or cancel out the voting strength of racial and political elements of the voting population.

B. The District Court's conclusion that the "monolithic political units" violate the Equal Protection Clause is entirely hypothetical. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called monolithic political units. Every voter and every constituency in the State, not only the voters and constituencies in the monolithic districts, would elect senators and representatives, who represent them and who must be vigilant to serve their interests in both houses. And the record never showed the minimization of the voting strength of any racial, political, social or economic minorities within the monolithic districts.

C. The District Court's injunction against certain parties, including Elmer F. Cravalho, *et al.*, from enacting any legislation until certain reapportionment legislation satisfactory to the District Court has been passed should be vacated as unnecessary if this Court approves the existing House apportionment and the Senate plan as a whole. And if this Court finds that one or both houses are invalid, this Court should nevertheless vacate the injunction and remand to the Dis-

trict Court for reconsideration of the desirability and need for such a drastic remedy, in light of the decision and rulings of the Court in these consolidated appeals and the situation at the time of the issuance of such judgment.

## II

A. Notwithstanding the invalidity of the provisions fixing the number of senators per senatorial district, the District Court has discretion to and did properly determine the validity of the apportionment of the Hawaii House of Representatives in the cause of affording necessary guidelines to the Hawaii Legislature. In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) this Court did not deem it unwise to answer substantial questions relating to Georgia's senatorial reapportionment at a time when the Georgia House of Representatives had been declared unconstitutional. *Fortson* v. *Toombs*, 379 U.S. 621, Appendix A at pp. 639-40 (1965).

Additionally, having found that there was no evidence to show that the Constitutional Convention would have apportioned the House in any other way than it did, the District Court held the provisions of the House apportionment severable from those of the Senate apportionment and properly determined the validity of the House apportionment.

B. The question of whether or not the District Court properly determined the validity of the House because of the alleged inseverability of the malapportioned Senate is now moot. This Court has before it the new Senate plan and the existing House apportionment which together constitute the bicameral system as a whole the validity of which is the subject of the several appeals at bar.

C. The District Court correctly held that the use of registered voters as a basis of apportionment did not, in Hawaii,

in fact designedly or otherwise operate to minimize or cancel out the voting strength of any elements of the voting population.

If total population were held to be the only basis for apportionment in Hawaii, the apportionment would result in gross inequity among citizens of the State eligible to vote particularly because of the large and fluctuating military population stationed and concentrated within a few legislative districts. The especially fluctuating circumstances of the military population in Hawaii render the total population figure an unstable, temporary and fleeting statistic. Moreover, those districts favored with the presence of the military provide breeding grounds for "rotten boroughs" where population is large and the number of voters is small. Additionally, the voter's vote in such districts would be weighted heavily and inequitably in his favor as against a vote of a voter living without such districts.

The registered voter basis provides a rational and suitable means of adjusting the apportionment base by excluding therefrom those of the military who are, by choice or circumstances, transients and will not or cannot register to vote in Hawaii. The military may register and vote if they qualify. The Constitution and laws of Hawaii do not *per se* exclude the military from establishing residence in Hawaii and thereafter becoming eligible to vote. The District Court found that the registration procedure does not discriminate against any class of persons. The use of the registered voter basis reflects population as envisioned by the Hawaii Constitutional Convention and comports with the equal population principle.

D. The District Court found that the multi-member districting of the House of Representatives was not invidious and followed along historical, political, geographic and

physical lines and that the apportionment was not the result of arbitrary and capricious action. Limitless possibilities exist in districting and apportionment that comport with the Equal Protection Clause, and the Governor's mere suggestion that other possibilities than the one adopted by the Constitutional Convention existed does not prove arbitrary and capricious action. Choice by the Constitutional Convention or Legislature as to one rational plan over another or more rational plans is not arbitrary action in the invidious sense.

Without a demonstration of invidious discrimination, the contention by the Governor that a person in a multi-member district has inordinate political advantage over a person in a single-member district because of the difference in numbers of legislators representing such persons is speculative. Conjecture based on political theory falls short of showing invidious discrimination.

As urged by the Governor, multi-member districts submerge minorities therein. There is no showing in the record to indicate who the minorities are and in what fashion they were invidiously discriminated against. Again the assertion of submergence is founded on speculation.

E. The District Court in its Order of April 28, 1965, disapproved the Senate plan declaring that the plan failed to meet federal constitutional requisites. The Governor contends that even if the Senate plan had not been violative of the Fourteenth Amendment, the District Court's refusal to approve should be sustained. While the District Court has a wide range of discretion in fashioning decrees to remedy malapportionment, judicial relief becomes appropriate only when a legislature has failed to reapportion according to federal constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

## ARGUMENT

### I. THE ERRORS OF THE DISTRICT COURT

In this Part I we brief the appeal of Elmer F. Cravalho, *et al.*, in No. 323. In Part II we will brief the issues on which Elmer F. Cravalho, *et al.*, stand as appellees.

#### A. The Equal Protection Clause Does Not Necessarily Require That the Hawaii Senate Be Apportioned In Accordance With a Rule of Single-Member Districts Notwithstanding That the Hawaii House of Representatives Is Composed of Single-Member and Multi-Member Districts. Absent Any Showing of Invidious Discrimination, Multi-Member Districts Are Valid In Both Houses.

The court below demanded that because Hawaii had a multi-member district House, the Senate should be redistricted into single-member districts, and any other than single-member senatorial districting would have to be justified by the Hawaii Legislature. (R. 154; 240 F. Supp., at 726)[6] The court below further ultimately indicated that the single-member rule was the "means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162; 240 F. Supp., at p. 731)

There is no such inflexible rule that requires one house of the legislature to be districted into single-member districts simply because the other house is composed of multi-member districts. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial dis-

[6] See also Memorandum, Appendix B, pp. 21a-22a.

tricts. *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964). In *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964) this Court stated: "We do not intimate that apportionment schemes which provide for at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties." 377 U.S. 713, 731, n. 21.

Thus the issue with respect to multi-member districts is not constitutionality but desirability. The question of desirability is not for the courts but for the legislature or a constitutional convention authorized to reapportion and redistrict. The Hawaii Legislature in enacting the reapportionment plan constructed multi-member districts, the reasons for which were expressly set forth in the committee report (R. 130-39) and testified to by Senator Sakae Takahashi. (R. 296-99) The plan as submitted should not be disapproved as unconstitutional on its face simply because it did not adhere strictly to a rule of single-member districting.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), this Court reversed the judgment of the District Court which was based on the alleged infirmity that attached to the statute on its face. The Court reaffirmed the constitutionality of multi-member districts and expressly "rejected the notion that equal protection necessarily requires the formation of single-member districts," but emphasized: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough

to consider whether the system passes constitutional muster." 379 U.S. 433, 439.

In the light of *Fortson* v. *Dorsey,* 379 U.S. 433 (1965), multi-member districts are valid, absent any showing of invidious discrimination. Similarly, the Senate plan composed of multi-member districts is valid, should not be subjected to any single-member district rule and should command constitutional validity, unless and until there is showing of invidious discrimination in and of itself or as a complement to the scheme of representation employed with respect to the House.

The court below places the burden of justifying multi-member districts on the Hawaii Legislature (R. 154; 240 F. Supp., at 726), and in condemning the Legislature in falling short of justifying the multi-member districts (R. 163; 240 F. Supp., at 731), cites *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964), which approaches the matter of apportionment "by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." (R. 163; 240 F. Supp., at 731)

If the court below interprets *Butcher* v. *Bloom, supra* as authority that the Legislature has the burden of justifying multi-member districts, that case is not controlling in the light of *Fortson* v. *Dorsey,* 379 U.S. 433, 439, which holds that a reapportionment plan involving multi-member districts is not unconstitutional *per se* and places the burden of establishing that the multi-member districting scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population on the party challenging the plan. The record does not support the Governor as having fulfilled that burden.

The record is barren of any evidence indicating that the voting strength of any particular person or groups of persons was in any way minimized or cancelled out. There was evidence showing the heterogeneity of districts, and the court below made capital emphasis of the racial and socio-economic heterogeneity within certain senatorial districts, *e.g.* the sixth senatorial district (which included the fifteenth representative district) with a concentration of Japanese in the Moiliili area and Caucasians in Waikiki with the high level professonal, technical and managerial people tending to live in Waikiki or upper Manoa and the laborers, clerical workers, middle and lower-income people tending to concentrate in the central (Moiliili, etc.) area; the fifth senatorial district with its multitude of Caucasian widows in the upland area and an overabundance of Filipino males in the seaward portion of the district; and the seventh senatorial district (which included the sixteenth and seventeenth representative districts) with the high income professionals in Waialae-Kahala and the low income laborers and clerical workers in the Palolo area. (R. 157-58; 240 F. Supp., at 728-29) Nothing can be gleaned from the evidence to indicate which of the racial or socio-economic groups or the various blends of such groups is the minority in which of the districts or whose voting strength was cancelled out or diluted, if at all.[7] The Governor baldly asserts and argues on the presumption, and the court below agreed, that the wide divergence in the character and interests of the population from the standpoint of race, occupation, income grouping and interests necessarily results in the invidious "submer-

[7] Consider the possibility of a racial minority being among the wealthy majority, or part of a racial majority being among the lower income minority in a district. Quite obviously limitless possibilities exist in defining a "minority" group when one considers additional factors such as sex, occupation, political status, etc.

gence" of someone or some group. (R. 335) The clear inference is that the plan is defective because heterogeneous districts *could* submerge a particular racial or socio-economic group so as to nullify that group's choice and thrusting upon it a senator for whom no one in the group had voted resulting in a futile and illusory exercise of its valuable franchise.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) Georgia's Reapportionment Act of 1962 provided for 54 senatorial districts and apportioned the 54 seats of the senate among the State's 159 counties. All were single-member districts except that, where more than one senator was assigned to a single county, all senators were to be elected at large, thereby resulting in single-member and multi-member constituencies. The opponents of the Act asserted that the scheme was defective because county-wide voting in multi-member district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. This Court rejected that argument as hypothetical which ignored the practical realities of representation in a multi-member constituency and stated: "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. . . . [S]ince his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of the people in his home district; thus in fact he is the county's and not merely the district's senator." *Fortson* v. *Dorsey*, 377 U.S. 433, 438 (1965). Analogously a senator from a district with multi-racial and multi-socio-economic groups whose members live together in clearly defined areas, freely or fortuitously, in their respective groups, should not be treated as a representative of only such group or groups

to which he happens to belong. Since his tenure depends upon the district-wide electorate, he must serve the interests of all the people in his senatorial district, and the minority veto—the power of the stalemate—possessed by each of the diverse groups could well deter and prevent the political disaffection of diverse groups within the district.

This Court's decisions on reapportionment[8], requiring equal weight to be assigned to each man's vote, in a very important sense, improve the nature of representation within the democratic context. Equally weighted votes do not, in themselves, however, guarantee a perfect or even a good system of representation. Numerical parity is one, perhaps the most important, but only one of several interrelated factors which can be ordered in a variety of ways to obtain representative government.[9] Other factors include the matters here in issue being the type of districts—single-member or multi-member or a combination of them—and the nature of a district's population—homogeneous or heterogeneous.

The court below found it necessary to consider the ramifications of numerical parity upon the other factors in a representation system. (R. 161; 240 F. Supp., at 730) Within the democratic context, however, legislative reapportionment is recognized primarily as a matter for consideration and determination by the citizens of the community itself through its representatives to be effected within certain constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

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[8] *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

[9] See De Grazia, Essay on Apportionment and Representative Government, pp. 9-31.

Any community complying with the Court's decisions will be faced with having to make political decisions on other factors affecting its representation system. A community, having the inherent right to make such decisions, should be free to make decisions suited to the community. It should be axiomatic that the shaping and balancing of the major factors in such a way as to produce the most equitable and most effective democratic system is not the same for all political communities or for the same community at different stages during its development.

The theoretical best in state electoral systems for equal weighting of votes may well be proportional representation in state-wide elections. See Stewart, J. in *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 750, n. 12 (1964). And quite obviously there are limitless alternatives and possibilities for districting consistent with the equal population standard, but a community should have discretion in making political judgments to fulfill its desires and needs, provided that population is the controlling consideration in its legislative apportionment and provided that no one has demonstrated that its apportionment scheme operates to minimize or cancel out the voting strength of racial, political, social or economic elements of the voting population.

The Hawaii Legislature's decision against a rule of single-member districts for the Senate was based on its belief and determination that a representation system consisting solely of single-member districts for the Senate would tend to fragment representation and create representatives responsive only to the problems and needs of a very small part of Hawaii's total population. (R. 123) Fairly included under such a belief would be the related worry that a representation system of single-member districts may tend to encourage the building of personal, small community political machines and discourage representatives from coping with larger prob-

lems of general concern to the State or with large groups within the State. It may inhibit the building-up of coherent political party organizations in Hawaii which may demand some loyalty of individual representatives on major issues. It may also weaken the Hawaii Legislature itself for representatives loyal to different interests and with narrow perspectives may tend to abdicate their responsibility for determining matters of major interests.

The Hawaii Legislature in good faith has divested the less populated areas of their over-representation. It would seem that the Hawaii Legislature could reasonably find it desirable for Hawaii to foster development of legislators with more than provincial interests of a small single-member district at this crucial moment when the rural and agricultural counties of Hawaii, Maui and Kauai are to be divested of ten senate seats which would be allocated to the highly urban and industrial City and County of Honolulu (island of Oahu). (R. 113-14) Upon reapportionment on the basis of population (registered voters), the City and County of Honolulu increases in senate seats from nine to nineteen whereas the counties of Hawaii, Maui and Kauai decrease in such seats from sixteen to six. This drastic shift in senate seats would leave only six senators to represent constituencies of the seven islands of Hawaii, Maui, Molokai, Lanai, Kahoolawe, Kauai and Niihau and nineteen senators to represent the interests of one island of Oahu. It would indeed be a propitious moment to inject that policy which encourages Oahu senators away from provincial interests of small single-member districts toward a sense of state-wide concern.

In addition to its concern against the creation of legislators responsive only to special-interest constituencies in single-member districts, the Hawaii Legislature may well have been prompted to favor heterogeneous districts over homogeneous enclaves as a desired policy to achieve certain

results which heterogeneous districts would accomplish and which the Legislature believed desirable for Hawaii at this particular period of its political development. Legislative districts which encompass diverse racial, social and economic elements are consistent with the democratic ideal and would encourage the various groups to participate in political activities with each other and work together in the political process. *Cf.* Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 63-67 (1964). At this stage in Hawaii's political development when the diverse elements are working well together the legislative districts in the Senate plan would further this development.

Heterogeneous districts tend to foster candidates who must be responsible to several group interests diverse on political issues, and the political compromises are effected during the election process. Homogeneous districts tend to foster candidates who are inclined to assume more singular stands on issues concerning a constituency with a provincial outlook. The political compromise process then tends to occur in the legislature rather than during the electoral process. Either system might be desirable at a particular period of a political community's development. The choice as to the desired district is, in large measure, a judgmental decision premised on the criterion of how best to achieve effective representation in a particular state at a particular time. In Hawaii, for example, a candidate running from the Kahala-Aina Haina area would tend to reflect the views of a relatively upper middle-class population. (R. 331) If, however, his district included both higher-income Kahala and lower-income Palolo he would tend to take broader stands to represent both population groups. (R. 331)

It would seem that the Hawaii Legislature could also reasonably find it desirable for Hawaii at this particular period of its political development to continue the traditional expe-

rience of heterogeneous districts, to have political issues determined by political compromises effected during the election process and to have the responsiveness of the legislators to diverse groups checked by the minority veto in a heterogeneous setting. The Legislature may have further reasonably found that the better legislators are bound to emerge from districts that are diverse in their socio-economic characteristics which would demand a legislator who must be conversant with more than a single electoral group and possessed of those skills to persuade and serve the interests of diverse groups. The Hawaii Legislature is presumed to have acted within its constitutional power. If any state of facts reasonably may be conceived to justify the use of multi-member districts which are heterogeneous in characteristics, then the Senate plan should be upheld. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961). The traditional application of this presumption in the instant case is especially compelling in that nowhere in the record does it expressly appear by testimony or exhibit that the Legislature *did not* consider socio-economic, industrial, occupational, or community of interest factors. While the committee report and Senator Sakae Takahashi's testimony were sparing with respect to a discussion of such factors, the committee report did state that the conference committee sought to preserve the Kalihi community against an alternative of cutting it up. (R. 137) And in his explanation of why the first and eighth precincts of the eleventh representative district were combined with the tenth representative district as part of the proposed fourth senatorial district, Senator Takahashi testified that they "found it to be logical to transfer these two precincts to the 4th Senatorial District because the areas involved are characteristic of the entire 10th District, 10th Representative District. It is not in a solidly urban area." (R. 300-01) In the Senate plan the Legislature chose to

construct districts which encompass heterogeneous constituencies. The Legislature, however, has drawn the encompassing district lines along meaningful natural, political, socio-economic and community boundaries. The fact that Robert Schmitt, who testified to the various demographic characteristics of the proposed senatorial districts (which characteristics had not been covered in the committee report or Senator Takahashi's testimony), had not been consulted (R. 326) should in no way rebut the presumption that such relevant facts were before the Legislature when it enacted the plan. The court below implies the presumption to have been effectively rebutted simply because Robert Schmitt had *not been consulted* (R. 156; 240 F. Supp., at 728), a conclusion bottomed on a hypothetical as it assumes Robert Schmitt to be the sole source of the matters he testified to and foreclosing any possibility that the legislators were independently knowledgeable of such matters.

To present a prima facie case, the opponents of the plan must show that the apportionment is inconsistent with any of the obvious and permissible bases of representation. Frankfurter, J., in *McGowan* v. *Maryland*, 366 U.S. 420, 468, 535 (1961); *Wright* v. *Rockefeller*, 376 U.S. 52, 57 (1964); 72 Yale LJ 968, 996. Without the benefit of the lower court's imposition of the rule of single-member districts, the deviation from which had to be justified with racial, socio-economic and other factors, the record does not support the Governor to have accomplished his prima facie case.

As earlier noted, the Legislature had reapportioned and redistricted the senatorial districts on the basis of population (registered voters), with consideration of existing political subdivisions, natural and historical boundaries, compactness and contiguity. (R. 136) The court below readily acknowledged the use of these bases by the Legislature, (R. 156; 240 F. Supp., 727-28) and approved of them as

proper and permissible bases in districting (R. 161; 240 F. Supp., at 730) except that multi-member districts had to be justified with racial, socio-economic, political and other such factors. No one contended that there was not substantial equality of population, and the court below found and agreed that the Legislature had met that test of substantial equality of population. (R. 155; 240 F. Supp., at 727) Senator Sakae Takahashi testified as to the reasons of the Legislature's choice in selecting multi-member districts over single-member districts (R. 296-97) which reasons had been explicitly set forth in the committee report. (R. 135) He further stated the position taken by the committee that there was "nothing wrong with having multi-member districts in the Senate and multi-member districts in the House." (R. 298) Mr. Robert Schmitt, a statistician, substantiated the rationality of the Senate plan and testified that the district lines followed natural, historical, geographic, census and community lines in logical pattern (R. 320-25) summarizing with the statement: "I would say this senatorial district [plan], as proposed, shows a good deal more logic and meaningfulness than the existing representative district [plan]." (R. 325)

Against all this evidence buttressed by the presumption that the Legislature acted in accord with federal constitutional requisites, the Governor could only present evidence showing certain districts to contain heterogeneous groups divergent in race, wealth, occupation, and interest (R. 329-32), and allude to an inconsistency that the Legislature ignored mountain and lava flows which separated East Hawaii from West Hawaii in combining them into one district (R. 308) and suggest that in the cause of homogeneity other possible alternatives in senatorial districting existed involving the 12th, 13th and 14th representative districts. (R. 309-10) The Governor also showed that certain senators

maintained residences in close proximity (R. 308) suggesting, and the court below found, that political self-preservation of the senators prompted the avoidance of single-member districts which would have left certain incumbent senators to compete head on for a single senatorial seat. (R. 163; 240 F. Supp., at 731) It was also brought out that the Legislature did not consider reapportioning the House when it adopted the Senate plan. (R. 297)

But wherein lies the demonstration of *invidious* discrimination? The burden of showing the Senate plan to be invidiously discriminatory must be sustained by the one who claims such injustice and seeks to have it set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality. *Fortson* v. *Dorsey,* 379 U.S. 433, 437 (1965); *Beck* v. *Washington,* 369 U.S. 541, 558 (1962). It is abundantly clear that a demonstration of invidious discrimination to the satisfaction of the court below in rejecting the plan was based on its own conclusions of law that where the House is based on multi-member districts and found to be valid, invidious discrimination is presumed in a districting plan for the Senate which is composed of multi-member districts (R. 154; 240 F. Supp., at 726), and that "monolithic political units" give majorities within such districts a disproportional monolithic command over entrapped minorities and over other voters in non-monolithic districts (R. 160; 240 F. Supp., at 729-30), the Hawaii Legislature thereby failing to positively complement the Senate plan to the makeup of the House. No conclusion or finding by the court below of invidious discrimination is founded on a clear and persuasive showing that the Senate plan operated to minimize or cancel out the voting strength of identifiable racial or political elements. It is submitted that the evidence adduced against the Senate plan merely suggest the *possibility* of submergence of a minority in a heterogeneous district, and the

possibility of political gerrymander because of the proximity of the residence of certain senators.[10] Such speculation coupled with erroneous conclusions of law fall far short of achieving that difficult burden of demonstrating that quantum of proof required to void a legislative act as repugnant to the Equal Protection Clause.

Further, race is a constitutionally impermissible basis for districting regardless of benefits, harms or motives, and the Legislature was under no duty to consider or justify the plan with racial factors.

Admittedly, some of the senatorial districts contained diverse racial groups with persons of the same or similar ethnic background "ghettoized", by choice or chance, in definitely identifiable areas. (R. 329-30) In addition to population, compactness and contiguity, which bases the court below agreed that the Legislature used in districting the Senate, (R. 156; 240 F. Supp., at 727-28) the court below emphatically stated that "community of interests, community of problems, socio-economic status, political and *racial* factors —each and all must be considered, and . . . the electoral districts be laid out with the totality of those factors having been taken into consideration." (emphasis added) (R. 161; 240 F. Supp., at 730) The court below found that the Legislature failed to adequately consider race and to justify the Senate plan with such factor. (R. 161; 240 F. Supp., at 730) However well meaning the court below may have been in its zeal to accomplish effective representation by requiring the Legislature to show that the plan was subjected to a full exposure of the group dynamics of American politics and

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[10] Even if political self-preservation of the senators prompted the avoidance of single-member districts, political gerrymander is not subject to federal constitutional attack under the Fourteenth Amendment. *Cf. WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965) *aff'd* No. 85, O.T. 1965, October 11, 1965.

justified by such factors to test the responsiveness of the plan. racial classifications are impermissible. *Brown* v. *Board of Education,* 347 U.S. 483 (1954), *Johnson* v. *Virginia,* 373 U.S. 61 (1963).

This Court has consistently declared racially segregated parks[11], beaches[12] and golf courses[13] unconstitutional. While the issue of impermissible classification by race in the *Brown* and post *Brown* cases arose in the context of obvious racial discrimination, the court below in the instant case presumably would have the Legislature consider the racial factor and would acquiesce to state sponsored racial segregation in districting to promote or preserve political advantage, as opposed to racial discrimination, with a view toward "substantial equality of meaningful representation to each and all of the voters of the State." (R. 161; 240 F. Supp., at 730) Although the racial factor is here obviously intended by the court below to be used as a basis in districting to accomplish a benevolent or positive discrimination to avoid foreclosure or "submergence" of the minorities, the principle enunciated in the *Brown* case is that the Constitution finds no room for racially drawn districts regardless of its motive, benevolent effects or discriminatory harm. 72 Yale LJ 1041, 1051; Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 59 (1964).

Arguably, the insistence of the court below that the Legislature "must" consider racial factors may be construed, not as a sponsorship of benign racial segregation, but as a duty on the part of the Legislature to use the racial criterion

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[11] *New Orleans City Park Improvement Ass'n* v. *Detrige,* 252 F.2d 122 (C.A. 5th Cir.) *aff'd* 358 U.S. 54 (1958).

[12] *Dawson* v. *Mayor of Baltimore,* 200 F.2d 386 (C.A. 4th Cir.) *aff'd* 350 U.S. 877 (1955).

[13] *Muir* v. *Louisville Park Theatrical Ass'n,* 202 F.2d 275 (C.A. 6th Cir.) *vacated and remanded,* 347 U.S. 971 (1954).

to affirmatively avoid the constitutional evil of intended racially homogeneous districts. This, however, is not borne out in the light of the lower court's finding, in its order of February 17, 1965, that Keaukaha with its smaller population composed of almost entirely Hawaiian[14] extraction was properly excluded from the Puna district whose larger population was very predominantly of Japanese extraction. (R. 76-77; 238 F. Supp., at 476-77) To do otherwise, the court below stated, would have left Keaukaha with *no* real representation. (R. 77; 238 F. Supp., at 477) Clearly and inescapably, the manner in which the racial factor was considered by the court below leaves no doubt that it regards racial classification as a probative, permissible and necessary basis for districting. The Puna-Keaukaha districting, however, was supported by compelling factors other than race such as contiguity, separate neighborhood and other geographic factors to warrant the separation of Keaukaha from Puna. (R. 76; 238 F. Supp., at 477)

Race is and traditionally has been of constitutional irrelevance. *Edwards* v. *California,* 314 U.S. 160, 185 (1941). Statutory classification by race is by its very nature "odious to a free people whose instructions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). The motives or purposes of the Legislature are entirely irrelevant. *Eubanks* v. *Louisiana,* 356 U.S. 584, 588 (1958).

Hawaii is composed of a multi-racial populace compacted within eight small islands. Races or ethnic groups of Caucasians (R. 329), Japanese (R. 329), Chinese (R. 271), Hawaiians (R. 76) and Filipinos (R. 330) are mentioned in the record as constituting part of Hawaii's population.

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[14] An ethnic group as distinguished from residents or citizens of Hawaii.

The names of the members of the conference committee (R. 111-12) indeed suggest the Senate plan as resulting from the joint effort of legislators with various ethnic backgrounds. While not judicially established, Hawaii has earned a reputation of racial harmony. Statehood for Hawaii in 1959 with its diverse racial peoples was a testament to that tradition and principle of our democratic society that the individual is important, not his race, color or creed. Racial consideration in districting would serve as a divisive force artificially creating and magnifying differences between candidates and voters that are irrelevant in the constitutional sense, See Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 66 (1964), a result particularly tragic to the Hawaiian community with its heritage of racial harmony. And given the settled principle that a State may not encourage its citizens "to vote for a candidate solely on account of race," *Anderson* v. *Martin,* 375 U.S. 399, 404 (1964), racial districting should be equally condemned as the state creates that setting, in however a subtle or indirect manner, which tends to limit a voter to vote for his racial kind.

Nor should expedience justify racial classification. To allow for impermissible race classification in districting as an expedient in the light of the possible advantages is to ignore the many subtle consequences attendant in racial districting. The resulting state sponsored political ghetto would foreclose opportunity for one to participate in various political activities with members of another race. The inherent detriment appears no less discriminatory than that injury presumed to result in segregation of schools and parks.[15] Moreover, it is popularly presumed that effective representation would be enhanced in having racial districts

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[15] See Comment, *Wright* v. *Rockefeller* and Legislative Gerrymanders—The Desegregation Decisions Plus a Problem of Proof, 72 Yale LJ 1041, 1052.

where voters can be represented by someone of their own ethnic background who understands their interests, problems and needs.[16] While there may be something to be gained in psychic advantage and satisfaction in allowing a voter to elect one of his racial kind, too often the identity of interest is mistakenly assumed by the color of one's skin. With these uncertain effects of racially segregated voting districts, it appears extremely unwise to even begin to approach consideration of so important a principle as the presumptive or *per se* invalidity of statutes based on race as yielding to situations involving racially segregated voting districts, and particularly in the case at bar, the record of which is wanting in the factual demonstration of any need for and benefit from racially reflective constituencies in the Hawaiian community.

**B. The Fact That the Geographical Boundaries of Certain Districts of One House of a Bicameral Legislature Are Identical To, Or Coincide To a Great Degree With, the Geographical Boundaries of Certain Districts of the Other House Does Not Violate the Equal Protection Clause.**

According to the District Court, "monolithic" political units violate the Fourteenth Amendment. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called monolithic political units. (R. 160; 240 F. Supp., at 729-30)

The District Court held that in order to achieve equality of representation, there should not be any such monoliths in

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[16] As intimated by the court below in its analysis of the Puna-Keaukaha districting. (R. 76-77; 238 F. Supp., at 477)

the reapportionment plan. (R. 160; 240 F. Supp., at 729) The District Court pointed out the monoliths in the Senate plan. (R. 160-61; 240 F. Supp., at 730) The 3rd senatorial district and the 8th representative district are the same. Also, the 6th senatorial district is to a certain extent identical to the 15th representative district.

The District Court condemned monolithic political units for two theoretical defects. (R. 160; 240 F. Supp., at 729-30) First, the monolithic political units would elect senators and representatives responsible to and representing the same constituencies. Second, the majorities in such districts would have a disproportional monolithic command over the entrapped minorities therein. The District Court felt that the monoliths do not provide the necessary cross checking and balancing of the two houses to correct the alleged defects above. We contend that monoliths do not result in the alleged defects nor does the record substantiate such defects.

In the District Court's explanation of the first of the alleged defects, it stated with reference to the 3rd senatorial district and 8th representative district: "Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency!" (R. 160; 240 F. Supp., at 730) First, there is no mathematical disparity in the fact that the voters of the 3rd senatorial district and the 8th representative disrict would elect seven members of the Legislature. Secondly, every voter and every constituency in the State, not only the voters and constituencies in the monolithic districts, would elect senators and representatives, who represent them and who must be vigilant to serve their interests in both houses. *Cf. Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965).

With reference to the 6th senatorial district and 15th rep-

resentative district, the District Court stated: "Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from the fifteenth representative unit, *i.e.*, from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district)". (R. 160-61; 240 F. Supp., at 730) Here, the District Court indulged in the assumption that the three-fourths of the voting population which reside in the 15th representative district would vote as a monolith to dominate the election of the six representatives and four senators. The assumption is certainly hypothetical in view of the diverse "sub-districts" within that three-fourths of the voting population. (R. 269-72) The District Court also ignored the effect of the additional one-fourth of the voting population on voting alignments within the 6th senatorial district.

With respect to the second of the alleged defects, the District Court does not find and the record does not disclose which are the dominant majorities and which are the entrapped minorities within the monolithic districts. The District Court never specified any dominant majority or entrapped minority in the 3rd senatorial district and 8th representative district. The District Court does make reference to the various groups in the 6th senatorial district and 15th representative district. However, it cannot specify which is the dominant majority and which are the entrapped minorities, if any. The record shows that the 6th senatorial district and 15th representative district encompass diverse "sub-districts." (R. 269-72) Waikiki, the center of tourism in Hawaii is within this area. The people here are short-term residents. They are middle and upper middle class. There is a high percentage of Caucasians. (R. 270-71) This so-

called monolithic unit also includes the McCully and Moiliili sub-district. The people here are largely middle and lower middle class. Occupationally, they are skilled, semi-skilled and clerical workers. There is a high percentage of Japanese residents. (R. 271) Then there is the Kapahulu sub-district, which is comparable to McCully and Moiliili. Racially, however, there are more Hawaiians and fewer orientals. (R. 271) These two districts also encompass the upper Manoa area. The people in this sub-district are professional, technical and managerial. (R. 329) Then there is the Bingham Tract, lower Manoa, St. Louis Heights sub-district, in which there is a large percentage of Chinese, a fair number of Japanese, some Hawaiians and some Caucasians. They are predominantly middle class. There are professionals, semi-professionals and managerial people here. (R. 271-72) The "University Community", around central Manoa, is another sub-district, and, of course, has a high proportion of University faculty and employees, and some students. (R. 272) Another sub-district is Makiki Heights and Tantalus. This area has many of the same characteristics as upper and central Manoa, except that the population density is lower. (R. 272) Manoa, generally, is largely Caucasian with a growing admixture of Chinese and some Japanese. (R. 271)

Even the sub-districts do not enclose strictly monolithic groups. The testimony of Robert Schmitt refers to percentages and proportions of racial, social and economic elements within the sub-districts. (R. 271-72) And the various racial, social and economic classifications overlap, *e.g.*, a person may belong to a racial minority but a social or economic majority. The District Court's assertion that monolithic majorities command entrapped minorities has no foundation in the record.

The Hawaii Legislature constructed the district lines for

these two so-called monolithic districts based on natural and historical boundaries. The key terrain feature which demarcated the 3rd senatorial district and 8th representative district is the Koolau Mountain Range, which sets off the entire "windward" side of the island of Oahu. (R. 136-37) This district has formed a unit since early Hawaiian history. (R. 321) The Hawaii Legislature added a part of the 14th representative district to the 15th representative district to form the 6th senatorial district to increase the number of registered voters for a four-member senatorial district in consistence with the equal population principle. (R. 300) The resulting division between the 6th and 5th senatorial district rationally separates the Kakaako area from the central business district.[17] (R. 323)

The so-called monoliths fail to show that the two houses do not complement each other. If the opponents of the total scheme of legislative apportionment prove an inequity in one house, then such inequity should be balanced in the other house. But if the record does not substantiate any real inequities, cross-checking and balancing are not demanded willy nilly.

### C. This Court Should Vacate the District Court's Injunction Against the Legislators From Enacting Any Legislation Until Certain Reapportionment Legislation Satisfactory to the District Court Has Been Passed.

On April 28, 1965, the District Court rejected the Senate plan submitted by the Hawaii Legislature and thereby reinstated its permanent injunction against the parties, including Elmer F. Cravalho, *et al.*, from enacting any legislation until legislation looking toward the convening of a constitu-

[17] Further, the District Court in its February order found that districting for the House of Representatives was not invidious. (R. 75; 238 F. Supp., at 476)

tional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed. (R. 80, 164; 238 F. Supp., at 479; 240 F. Supp., at 732) This injunction is directed against certain parties which include the majorities of both houses of the Hawaii Legislature. At that time the injunction prohibited the legislators from enacting legislation essential for the health and welfare of the people of Hawaii and appropriations legislation for the orderly functioning of State and county governments in the fiscal year beginning July 1, 1965. In view of such emergency, on May 13, 1965, an Application for Stay of this severe remedy was presented to Mr. Justice William O. Douglas. On May 21, 1965, Mr. Justice Douglas granted the stay. The Hawaii Legislature then was able to pass the essential legislation for the fiscal year 1965-66. The stay is to remain in effect pending the issuance of the judgment of this Court.

If the judgment of this Court is that the total scheme of Hawaii legislative apportionment, composed of the present House apportionment and the Senate plan comports with federal constitutional requisites, then the injunction should be vacated as unnecessary. And if the judgment of this Court is that one or both houses are invalid, then the Court should nevertheless vacate the injunction and remand to the District Court for reconsideration of the desirability and need for such a drastic remedy,[18] in light of the decision and rulings of the Court in these consolidated appeals and the situation at the time of the issuance of such judgment. *Cf. Fortson* v. *Toombs*, 379 U.S. 621 (1965). We also respectfully

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[18] According to the Hawaii Constitution the Legislature shall convene in budget session on February 16, 1966. The Legislature must provide appropriations legislation for the fiscal year 1966-67 and any urgency measures necessary in the public interest. Article III, Section 11, Constitution of the State of Hawaii (Appendix A, p. 4a-5a)

suggest to the Court that it might be appropriate that its opinion disapprove any reimposition of such an injunction at a time when it would threaten the severe interference with the machinery of State and county governments which it did at the 1965 session.

## II. THE CORRECT DETERMINATIONS OF THE DISTRICT COURT.

### A. The District Court Properly Determined the Validity of Certain Provisions of the Hawaii Constitution Relating to Apportionment, Notwithstanding the Invalidity of the Provisions Fixing the Number of Senators Per District.

In its order of February 17, 1965, the District Court declared invalid the provisions of the Hawaii Constitution fixing the number of senators per senatorial district. (R. 79; 238 F. Supp., at 478) The District Court found nothing invidious in the total number of senators, *i.e.*, 25 (R. 66-67, n. 4; 238 F. Supp., at 472, n. 4), nor in the districting of the Senate. (R. 75; 238 F. Supp., at 476) The apportionment of the Hawaii House of Representatives was declared valid. (R. 79-80; 238 F. Supp., at 478-80)

The proper judicial focus, of course, is the total scheme of State legislative apportionment. A District Court, however, acts properly when it states its views to provide guidelines for legislative action. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). It should be left to the District Court's discretion to decide whether it should determine the validity of certain provisions of legislative apportionment, notwithstanding the invalidity of the provisions fixing the number of senators per district. In this case, the legislators of both houses had intervened to make known their views and seek guidelines for the purpose of reapportionment. Under such

circumstances the District Court appropriately determined the validity of the House apportionment and certain other provisions of the Hawaii Constitution relating to apportionment.

Indeed, in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) this Court has deemed it wise to answer substantial questions relating to Georgia's senatorial reapportionment alone. At that time the apportionment of the Georgia House of Representatives had been declared unconstitutional. *Fortson* v. *Toombs*, 379 U.S. 621, Appendix A at pp. 639-40 (1965).

Thus the three-judge court acted within its discretion in determining the validity of the House apportionment. It was also appropriate for the District Court to declare as a guideline for legislative action that the districting for both houses under the Hawaii Constitution was not invidious. The total number of senators, *i.e.*, 25, of course was not invidious. *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 581, n. 63 (1964).

Further, the District Court properly determined the validity of the House apportionment, because it found that the apportionment of the House of Representatives was severable from the apportionment of the Hawaii Senate. The District Court found that there was no evidence to show that the Constitutional Convention would have apportioned the House in any other way than it did. (R. 66; 238 F. Supp., at 472) The Constiutional Convention thoroughly explored the matter of the size of the two bodies. (R. 66-67, n. 4; 238 F. Supp., at 472, n. 4) The Convention also thoroughly discussed the registered voter basis of apportionment. (R. 68-69; 238 F. Supp., at 473) And as the records of the Constitutional Convention show, the districting, both for the Senate and House of Representatives, followed along historical, political, geographic and physical lines. (R. 75; 238 F. Supp., at 476)

**B. The Question Whether the District Court Properly Determined the Validity of Certain Provisions of the Hawaii Constitution Relating to Apportionment, Notwithstanding the Invalidity of the Provisions Fixing the Number of Senators Per District, Is Now Moot.**

The Hawaii Legislature has now presented a new total scheme of legislative apportionment. The legislators have enacted the Senate plan to replace the concededly malapportioned Senate under the Hawaii Constitution, and the legislators have always supported the apportionment of the House of Representatives under the Hawaii Constitution, since their intervention in this case. (R. 45-53)

Thus the new Senate plan and the existing House apportionment is now the complete legislative apportionment package for the State of Hawaii. The Governor contends that the District Court's determination of the validity of certain provisions of the Hawaii Constitution relating to apportionment has grossly embarrassed orderly reapportionment in Hawaii. This contention is based on the premise that the complete legislative apportionment package provided by the Senate plan and the existing House of Representatives violates the Fourteenth Amendment. We contend that this complete legislative apportionment is in accord with federal constitutional requisites.

Since the legislators have now presented this complete legislative apportionment for review by this Court, the question whether the District Court properly determined the validity of certain provisions of the Hawaii Constitution relating to apportionment is now moot.[19]

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[19] The District Court's determinations may also be regarded as precatory and advisory. *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 586, n. 68 (1964).

### C. The District Court Properly Determined the Validity of the "Registered Voter" Basis For Legislative Apportionment For Hawaii.

The court below held in its February decision that the "use of registered voters as a basis of apportionment did not, in Hawaii, in fact 'designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population.'" (R. 75; 238 F. Supp., at 476) It further found that that basis of apportionment when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment substantially on a population basis. (R. 68; 238 F. Supp., at 473)

In asserting that the registered voter basis for legislative reapportionment in Hawaii is an impermissible measure of representation, the Governor reasons that "those who may not vote are still entitled to representation." (Gov. 48) On this we understand the Governor to mean more specifically, and we agree, that those who may not vote may still be counted in the apportionment base. A State may, however, justifiably classify and exclude certain persons from the apportionment base.[20]

The exclusion from the apportionment base is admittedly discriminatory, but the prohibition of the Equal Protection Clause goes no further than the *invidious* discrimination. *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 489 (1955). It is submitted that that point has not been reached here. To be sure, the Governor concedes that discriminatory governmental limitations may be placed on the right to vote to guarantee mature and informed judgment

[20] In *Davis* v. *Mann*, 377 U.S. 678, 691 (1964), the Court held that discrimination against military personnel by excluding them from the apportionment base merely because of the nature of their employment, *without more being shown*, is constitutionally impermissible. Presumably certain exclusions may be permissible if "more" be shown.

by the electorate. (Gov. 48) And a statutory discrimination will not be set aside if any state of facts may be reasonably conceived to justify it. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961).

The question involved here is to what degree, if at all, the Equal Protection Clause limits Hawaii's freedom to establish appropriate legislative apportionment on a population basis excluding certain classes of people. The apportionment of the Hawaii House of Representatives based on registered voters is substantially based on population.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court was not concerned with the problem of defining what it meant by population. That issue was not before this Court. It was merely fortuitous that the apportionment plan for the Alabama House of Representatives provided by the Alabama Constitution required decenniel reapportionment based on inhabitants as ascertained in the decenniel census of the United States. Enroute to its decision and in enunciating the equal population principle, however, the Court referred to the practical impossibility to arrange legislative districts so that each one has an identical number of *residents*, or *citizens*, or *voters*. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). Even if total population is of necessity the starting point for legislative apportionment, the Court suggests tacit acquiescence of a resident, citizen or voter population basis for state apportionment as embraced within the meaning of "population basis" by the Court's use of the terms residents, citizens and voters interchangeably. Accordingly, the Court acknowledged the use of a "citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment." *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 641 (1964).

The Governor further contends that the registered voter basis may be upheld "only if it happens to be an adequate re-

flection of total population—and only as long as it is." (Gov. 43) In the same vein, the District Court in *Ellis* v. *Mayor of Baltimore*, 234 F. Supp. 945 (D. Md. 1964), *aff'd* 4th Cir., October 11, 1965, 34 U.S.L. Wk. 2215, suggests a requirement that the ratio of the number of registered voters to the number of total population be substantially equal among the districts. *Id.*, at 958. But such an inflexible standard of mathematical correlation forecloses a State from rationally ever classifying and excluding certain persons from total population in determining the apportionment base. We do not believe that such a harsh and restrictive standard was intended under the equal population principle. And we contend that the registered voter basis for apportionment in Hawaii substantially and adequately reflects total population not by mathematical correlation between total population and registered voters but by rational and constitutionally permissible exclusions of certain classes of persons from total population. The *Ellis* case, *supra*, was decided on the premise that the population statistic (to which the registered voter statistic was compared) was a fair estimate of total population without issue as to the fairness of the population statistic. In the case at bar, however, one of our contentions is that the federal census population is not a fair estimate of total population in Hawaii because of the significant transient military population which severely distorts the total population statistic.

Not only did this Court note in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964), that New York used citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment, but also demonstrated the arithmetical inequities of the State's apportionment scheme by basing its calculations on citizen population. *Id.*, at 647-51. There was nothing in that opinion intimating that the citizen population base contributed in

any way to the unconstitutionality of the State's scheme, nor was there hint of any concern by this Court that the ratio of citizen population to total population must be substantially equal among the districts before demonstration of arithmetical inequities by calculations based on citizen population could be relevant. *Cf. Buckley* v. *Hoff*, 243 F. Supp. 873 (D. Vt. 1965). Although the question was not before the Court, it is obvious that the Court assumed that New York could classify and exclude aliens from the apportionment base and that such classificatory basis was a rational one and constitutionally permissible. The scrutiny in the instant case should focus, therefore, not on the mathematical quantum or degree of deviations between total population and registered voter population among the districts in Hawaii but on whether or not the classification and exclusion of those who cannot or did not register to vote from the apportionment base are rational and constitutionally permissible in Hawaii's attempt to order an over-all representation system to comport with the equal population principle.

The use of a total population basis in an apportionment plan for Hawaii would unduly weight a voter's vote in his favor simply because he happens to live in an area more populous by virtue of a non-voting and transient population, thereby submerging that assurance to each citizen of an equally effective voice in the election of members of the Hawaii Legislature.

The 1960 federal census definition of population was based on all persons whose normal place or residence was in the State of Hawaii. (R. 209) That census also included: Military personnel stationed ashore in the area, ships' crews (both civilian and military) in ports of the area in question on the census date, regardless of their legal or voting residence or the transient nature (R. 209), persons in transient accommodations (hotels, trailers, camps, etc.) if they

have no regular place or residence or are in the process of changing residence (R. 209-10), local residents temporarily out of the State on business or vacation, students from other areas attending a local university, regardless of legal or voting residence (R. ~~211~~ 230), and inmates of long-term institutions (mental hospitals, prisons, etc.). (R. 216) Thus, the census figures would readily distort the voting strength of the voters of those areas which include many of such usually non-voting and transient persons.

The difficulties attendant in the use of the federal census figures may be particularly unique to Hawaii in that there are large pockets of military and maritime personnel in certain areas constituting a sizeable proportion with respect to the total population within certain legislative districts.[21] As the court below found and acknowledged, "Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear." (R. 71; 238 F. Supp., at 474) The United States Census Bureau data covering the military population in Hawaii for the last 25 years, clearly supporting the finding of the court below, are set forth as follows: (Pl. Ex. 15; R. 388, 260)

| | | | |
|---|---|---|---|
| 1940 | 30,000 | 1953 | 48,000 |
| 1941 | 48,000 | 1954 | 38,000 |
| 1942 | 136,000 | 1955 | 56,000 |
| 1943 | 200,000 | 1956 | 58,000 |
| 1944 | 407,000 | 1957 | 60,000 |
| 1945 | 355,000 | 1958 | 55,000 |
| 1946 | 65,000 | 1959 | 56,000 |
| 1947 | 38,000 | 1960 | 59,000 |
| 1948 | 33,000 | 1961 | 61,000 |
| 1949 | 31,000 | 1962 | 79,000 |
| 1950 | 21,000 | 1963 | 60,000 |
| 1951 | 44,000 | 1964 | 60,000 |
| 1952 | 55,000 | | |

[21] Particularly the 8th, 9th, 10th, 11th and 13th representative districts. (Pl. Ex. 16; R. 391, 261).

The fluctuation of seismic proportions around 1944 was, of course, due to World War II after which followed a rapid personnel demilitarization until the military population had been reduced from 407,000 in 1944 to 21,000 in 1950. In the following year, 1951, the number of military personnel doubled and in the year next, 1952, almost tripled the 1950 figure. These were the years of the Korean conflict after which there followed a consistent and sharp reduction in 1954 to 38,000. Again in 1962 the military population of 79,000 represented a 20,000 increase after only two short years over the figure of 1960. It may be mere coincidence that the Viet Nam crisis follows the marked fluctuation in 1962.

The military population figures above do not include the military dependents. If we may assume that there is a reasonable correlation between the fluctuation of the military personnel and their dependents, then there would, of course, be a more pronounced effect of the fluctuation of the military population on the total population.

It is also instructive to note that at least 90% of the military population in 1960 were concentrated in the fifth senatorial district and at least an aggregate of 90% in the eighth, ninth, tenth, eleventh and thirteenth representative districts.[22] (Pl. Ex. 16; R. 391, 261) The transient and fluctuating circumstances of the military personnel would thus render the concept of "population" somewhat elusive in these districts. Total population this year would not, from statis-

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[22] The Governor has pointed out deviations in the per cent registered among the 1960 civilian population. (Gov. 63) It is interesting to note that but for the areas in which the military are concentrated (8th, 9th, 10th, 11th and 13th representative districts) the deviations are slight. This can be more readily appreciated when we calculate the proportion of 1960 Federal Census

tical experience in Hawaii,[23] be total population next year so far as the military population is concerned. The fluctuation in military population is independent from and does not appear to have significant correlation to changes in civilian population so that it can hardly be deemed a temporary imbalance where the military are situate.

The District Court cited a possibility that could lead to absurd results by including the total population so that "areas which normally would have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature..." (R. 72; 238 F. Supp., at 474-75) Admittedly the example was given in the context of the abnormal wartime situation in Hawaii in 1944, but the Governor does not deny such or similar possibility to a lesser degree.

The Governor has urged single-member districts. (R. 333) Given the present size of the House of Representatives and census population as the numerical base of representation, it would be possible to construct a representative district consisting of a military base or portion thereof which would have almost no voters. (R. 275)

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population registered in Hawaii among the senatorial districts as follows: (Pl. Ex. 1; R. 339)

| Sen. Dist. | 1960 Registered Voters | 1960 Population | Per Cent Registered |
|---|---|---|---|
| 1 | 19,266 | 44,297 | 43 |
| 2 | 6,793 | 17,035 | 40 |
| 3 | 17,539 | 42,855 | 41 |
| 4 | 73,981 | 182,307 | 41 |
| 5 | 73,142 | 318,102 | 23* |
| 6 | 11,338 | 28,176 | 40 |

* 90% of the military population in 1960 were concentrated in the 5th senatorial district. (Pl. Ex. 16; R. 391, 261).

[23] Pl. Ex. 15; R. 388, 260.

The use of the population basis in Hawaii not only results in the unintended and egregious results above but spawns another worry which hits at the heart of representation. More specifically the question is posed as to whether the apportionment of additional legislative seats to those areas in which the transient military and their dependents reside will actually result in providing members of these groups with representation in the legislative body or will simply result in weighting more heavily the representation of the registered voters residing in those specific areas. If the 1960 federal census were used as the base, instead of the registered voter basis, the ninth representative district, which includes Schofield Barracks, would be entitled to a greater number of legislative seats[24] based on 42,816 persons of which 11,883 are military personnel (not including military dependents). (Pl. Ex. 16; R. 391) Actually, however, such a district would have a relatively small voting population made up primarily of plantation workers living in and around Wahiawa and small business and professional men of that community serving the military population plus a small number of soldiers and their families who happen to be Hawaii residents. Although speculative, political realism would have the plantation workers and the small businessmen select representatives who would primarily represent their interests over the concerns of the transient military population. The likely result is that one would simply weight the vote of this portion of Hawaii's registered voter population several times that of those voters within a district not favored with the presence of the transient military population. Such

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[24] 1960 registered voters numbered 7,410 in the ninth representative district constituting about 3.6% of the total number of registered voters of 202,059. The total population of the ninth representative district (42,816) was about 6.7% of the total population of the State (632,772). (Pl. Ex. 1; R. 339)

a situation may well court and foster the evolution of "rotten boroughs" where population is large but where there are only a few voters.

The right to have one's vote counted equally with that of every other voter and the right to be counted in the apportionment base are but two sticks in that bundle of a citizen's right to representation. Under the total population basis in the Hawaiian context, the voter's vote is unduly diluted, and under the registered voter basis, the non-voter's representation is diminished by exclusion from the apportionment base. Either basis will diminish, but not invidiously, one avenue of a citizen's right to representation. The choice of either of the bases would be a decisional exercise of the State in its attempt to order that over-all system that would best approach the equal protection ideal in representation. Hawaii has chosen the registered voter basis as one better suited to achieve equitable and meaningful representation under the circumstances peculiar to its community.

The registered voter basis provides a rational basis by which measure a more accurate and fair gauge of total population (non-transients) can be realized in Hawaii. Indiscriminate use of census figures without refinement to adjust to significant number of transients may not be a fair estimate of total population. The transients, who severely distort the population picture, should be excluded from the apportionment base.[25] The registered voter basis is a reasonable measure to identify and separate the transients because of the requirement of one year residence in Hawaii as a precondition to registration. The military personnel have a

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[25] The Governor would agree at least that "[i]f the census figures must be refined in order to obtain a fair estimate of the non-transient population of the State, then this should be done." (Gov. 68)

lower incidence of registration than those of other groups.[26] (Pl. Ex. 14; R. 368, 260) All members of the military are not *per se* excluded from registration as a class.[27] The military who are excluded are not excluded merely because of the nature of their employment but because of the transient circumstances and the fluctuating nature of their lot in Hawaii which disturbs total population and hence the apportionment base to the detriment of the weight of the citizen's vote.

While it happens that the registered voter basis also excludes from the apportionment base (in addition to the civilian transients and military transients) residents of Hawaii who are either ineligible to vote and cannot register or qualified to vote but fail to register, the discrimination to such classes of persons is not invidious. Here the benefit we derive in arriving at a more realistic total population statistic and thereby achieving a more equitable representative system for Hawaii by the use of the registered voter basis far outweighs the discrimination reasonably imposed on those excluded from the apportionment base.

With respect to those residents who are qualified to vote but for their failure to register, their exclusion seems hardly

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[26] Voting qualifications in Hawaii include one year residence in the State (R. 276-77) which probably accounts for low registration among those of the military from other states fulfilling their draft obligations with a short tour of duty of say two years or less in Hawaii. Also many may choose not to seek residence in Hawaii but maintain their original legal and voting residence and vote for candidates in their home states.

[27] Hawaii continues to register such military personnel as are qualified. (R. 280-81) And the District Court found that "if he so desires to become a resident of Hawaii . . . there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote." (R. 73; 238 F. Supp., at 475)

discriminatory in the light of their opportunity to be included in the apportionment base by the simple act of registration. The District Court found "no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens." (R. 73; 238 F. Supp., at 475) Concerted efforts were made by the office of the clerk of the City and County of Honolulu to register as many persons possible of those so qualified by recruiting volunteer registrars and locating them at various points for the convenience of registrants, by distributing information sheets on registration procedures and locations of registration points, and by public advertisements on registration in the daily newspapers. (R. 278) No more effort is being asked of the citizen for his inclusion in the apportionment base than is required by the State for the inclusion of his name on the voting rolls.

For those persons who are ineligible to vote and cannot register, their exclusion may be reasonably founded not only on expedience but on grounds touching and concerning a State's effort to achieve better forms of representation. The illiterate and the children are included among those persons who are ineligible to vote in Hawaii. (R. 276) The Governor would concede to governmental limitation on the right to vote by the illiterate and the children to guarantee mature and informed judgment by the electorate. (Gov. 48) Exclusion of the illiterate and children from the apportionment base appears no more discriminatory. It may be that the reason to disqualify the illiterate and the children from voting has no apparent relevance to their exclusion from the apportionment base. There is, however, a subtle but important interdependence between the right to vote and the right to be included in the apportionment base. Effective and meaningful representation may not necessarily be achieved

by being counted in the apportionment base without the right to vote. Let us assume, for example, that an additional legislative seat is apportioned to a district as a result of the inclusion of the illiterate and the children, who are disqualified from voting, in the apportionment base. The representative elected to occupy that seat does not, in fact and in the minds of the illiterate and the children, adequately represent their interests. What is the remedy? Unlike a voter who may vote for someone else in the next election, the illiterate and the children have no such remedy and must be resigned to their lot of having a "representative" indifferent to their needs. Representative government surely must include legislators responsive to the constituents and surely must include device and opportunity for a timely check on disaffection of constituents by legislators. The right to vote provides such a check as illustrated above. Meaningful representation to a class of persons is not necessarily achieved simply by their inclusion in the apportionment base. It must be coupled with the right to vote, without which representation can be wholly illusory. As the illiterate and the children are disqualified from voting in Hawaii, the State may well be justified in excluding them from the apportionment base. *Cf. McGowan* v. *Maryland*, 366 U.S. 420 (1961).

It is submitted therefore that not only is the registered voter basis permissible under a legislative apportionment plan but, with respect to the State of Hawaii with its significant transient population, it is far less egregious in its effects on citizens, qualified voters, residents and inhabitants, than any total population basis.

The use of the "registered voters" measure in Hawaii does not invidiously discriminate against any group of persons.

The Governor contends that the "registered voters" measure discriminates invidiously against certain groups, namely, the poor (Gov. 60-61), the illiterate (Gov. 61-62), the

children (Gov. 62) and the military (Gov. 63) by their exclusions from the apportionment base or by their residence in districts of those persons excluded.

The Governor's contentions have a certain emotional appeal, interestingly presented, but only so meritorious. As we have argued and demonstrated earlier, Hawaii may in rational manner exclude certain persons from the apportionment base in the process of devising a representative system for the State. Even if we were to assume without conceding that the use of the registered voter basis must be predicated on a mathematical correlation between registered voter population and total population from district to district, the Governor has not demonstrated that the total population was not adequately reflected as there is nothing in the record showing the total population for the year 1958 to compare with the 1958 registered voter population, the basis on which the present House apportionment occurred in 1959. On this the court below correctly perceived and noted:

> "Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson*, *supra*, 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims*, *supra*, Subject VIII. This Court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment 'substantially on a population basis.'" (R. 68; 238 F. Supp., at 473)

Moreover, the application and relevance of other statistics which the Governor presents are suspect. In attempting to show that the registered voter basis discriminates against

the poor, the Governor cites that among the eligible voters on Oahu with a family income of less than $4,000 only 43.8% were registered while among those in the $15,000 or more bracket, 77.7% were registered. (Gov. 61) In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which the Governor cites, the defendant, convicted of armed robbery, could not achieve an appeal because of his inability to pay for a transcript necessary to pursue the appeal. The appeal depended on whether or not one could afford the costs thereof. In the instant case, there is no cost involved to registration so that inability to pay is of no consequence. The act of registration in Hawaii can be accomplished with equal facility and opportunity by persons of all economic classes. (R. 276-77) Simply because the proportion of registered persons in the lower economic class turned out to be less than those in the higher is not at all persuasive to show invidious discrimination. It is noted that the Governor chooses not to assert that the registered voter basis discriminates against those with 13 or more school grades whose registration percentage among the eligibles is 58.7% as compared to those with 8 or less school grades whose registration percentage is 73.9%. (Pl. Ex. 14; R. 368, 260).

### D. The District Court Properly Held That the Multi-Member Districting of the House of Representatives Comported With the Equal Protection Clause.

The Governor urges that the apportionment of the Hawaii House of Representatives should have been declared unconstitutional because of its multi-member districts. (Gov. 70) In Part I, subpart A, we developed that multi-member districts are valid in both houses, provided that population is the controlling consideration and provided that no one has demonstrated that the apportionment scheme operates to minimize or cancel out the voting strength of racial, political, social and economic elements of the voting population.

The District Court found that the districting of the House of Representatives was not invidious and followed along historical, political, geographic and physical lines. (R. 75; 238 F. Supp., at 476) It also found that the apportionment was not the result of arbitrary and capricious action. (R. 79-80; 238 F. Supp., at 478-79) To be sure, districting and apportionment to achieve substantial equality of population may well be at once rational and arbitrary. In a given situation the legislators may be confronted with two or more rational choices in constructing the district lines. To that extent the legislators perforce arbitrarily make one rational choice over another.

It is contended that, as a matter of political theory, a person in a multi-member district has an inordinate political advantage over a person in a single-member district, and the six-member 15th Representative District is cited as an example. (Gov. 76-77) But there is no showing that the 15th Representative District has displayed inordinate political power as compared with the lesser-member representative districts on Oahu or in the State.

The Governor further contends that the multi-member districts of the House deny equal protection to the minorities therein. (Gov. 80) As we have developed in Part I, subparts A and B, the record does not manifest which minorities, if any, are in fact submerged. The record is also barren of any evidence that any minority has been deprived of a chance to elect a representative. In any event a representative, because his tenure depends on the entire electorate of the district, must be vigilant to serve all the people of the diverse groups in the district which he represents. *Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965).

Moreover, in *Mann* v. *Davis*, 245 F. Supp. 241 (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October 25, 1965, certain Richmond Negro residents

complained of the multi-member districting of the City of Richmond in both chambers. The City of Richmond was combined with Henrico County to form an eight-member House of Delegates district. The City of Richmond formed a two-member Senate district. These residents contended that such multi-member districting deprived the Negro minority of a chance to elect one of their race to the General Assembly. They contended that the City of Richmond should be divided into five single-member House of Delegates districts and two single-member Senate districts. The District Court held that the Equal Protection Clause does not demand single-member districting in either or both chambers to assure the success at the polls of any racial minority.

**E. If the Senate Plan Had Not Been Violative of the Fourteenth Amendment, the District Court Should Have Approved Such Reapportionment.**

The District Court in its order of February 17, 1965, declared that the Hawaii Senate was malapportioned and imposed its injunction against the legislators from enacting any legislation until legislation looking toward the convening of a constitutional convention has been passed. (R. 80; 238 F. Supp., at 479) Thereafter the legislators moved the District Court to amend its order to allow the Hawaii Legislature to enact a reapportionment plan to be submitted to the District for its approval. (R. 83-85) The District Court amended its order accordingly. (R. 88-91) On April 28, 1965, the District Court disapproved the reapportionment plan, which the legislature had submitted, and declared that the plan failed to meet federal constitutional requisites. (R. 162-63, 164; 240 F. Supp., at 731, 732) The Governor has argued that even if the Senate plan had not been violative of the Fourteenth Amendment, the District Court's refusal to approve it should be sustained. (Gov. 104)

We contend that the District Court properly used as its test

of approval the Fourteenth Amendment. Reapportionment is primarily a matter for legislative consideration and determination. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656, 676 (1964). Because the legislators are the representatives of their community, they have the primary responsibility to construct a reapportionment plan which they deem will fulfill the desires and needs of the community. In scrutinizing a legislative reapportionment plan, a District Court must not reject such plan because of its own notions of the ideal scheme within federal constitutional limits. The proper test of approval is whether the legislative plan comports with the Equal Protection Clause.

To be sure, the District Court has a wide range of discretion in fashioning decrees to remedy malapportionment. Judicial relief, however, becomes appropriate only when a legislature has failed to reapportion according to federal constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

## CONCLUSION

For the reasons stated, paragraphs 1, 2 and 3 of the decision and order of the District Court dated February 17, 1965, should be affirmed, and paragraph 4 of said decision and order should be reversed. The decision and order of the District Court dated April 28, 1965, should be reversed; and the Legislature's Senate plan, Act 281, Regular Session 1965, Third Legislature of the State of Hawaii, should be declared valid in accordance with the Equal Protection Clause.

Respectfully submitted,

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